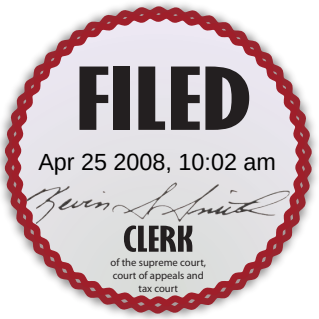

ATTORNEY FOR APPELLANT:

STEPHEN H. RABE
Rabe Law Offices
Richmond, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

THOMAS D. PERKINS
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

BILLY J. FREEMAN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 89A04-0711-CR-628
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE WAYNE CIRCUIT COURT
The Honorable Matthew Cox, Judge
Cause No. 89C01-0705-FD-62

April 25, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Billy Freeman appeals his conviction and sentence for class D felony possession of a schedule III controlled substance. We affirm.

Issues

Freeman raises three issues, which we restate as:

I. whether the trial court properly admitted evidence obtained during a search of his pocket;

II. whether the trial court properly entered judgment of conviction for possession of a schedule III controlled substance when he was charged with possession of a schedule II controlled substance; and

III. whether he was properly sentenced.

Facts

In the early morning of May 25, 2007, Richmond Police Officer Patrick Tudor observed Freeman and another man outside a bar "kind of arguing and being loud." Tr. p. 119. Officer Tudor followed them as they walked away from the bar. The two men continued arguing and began yelling at one another. The two men "locked up" to fight and "had their hands on each other and were kind of like in a hockey fight, were throwing blows at each other and kind of maneuvering back and forth trying to avoid being hit." Id. at 122. Officer Tudor called for back up, and Officer David Glover arrived soon thereafter.

The officers got out of their patrol cars and approached the two men. Officer Tudor immediately observed that the men were intoxicated based on a strong odor of alcohol, their unsteadiness, their loud, abusive attitudes, their slurred speech, and their

bloodshot eyes. The officers arrested the two men for public intoxication and patted down the men. Officer Glover found a cellophane package containing pills, later determined to be hydrocodone, in Freeman's pocket.

On May 25, 2007, the State charged Freeman with Class D felony possession of a schedule III controlled substance. That same day, the State alleged that Freeman was an habitual substance offender. On August 20, 2007, the State amended the information from Class D felony possession of a schedule III controlled substance to Class D felony possession of a schedule II controlled substance. Despite the amendment, the jury was instructed regarding the possession of a schedule III controlled substance, the jury found Freeman guilty of possession of a schedule III controlled substance, and the trial court convicted Freeman of possession of a schedule III controlled substance. Freeman pled guilty to being an habitual substance offender, and the trial court sentenced him to three years on the possession charge, which was enhanced by an additional seven years for being an habitual substance offender. Freeman now appeals his conviction and his ten-year sentence.

Analysis

I. Admission of Evidence

Freeman argues that the trial court improperly denied his motion to suppress and admitted evidence of the drugs found in his pocket. Although Freeman originally challenged the admission of the drugs in a motion to suppress, he appeals following the admission of the evidence at trial. Accordingly, the issue is framed as whether the trial court abused its discretion by admitting the evidence at trial. Cole v. State, 878 N.E.2d

882, 885 (Ind. Ct. App. 2007). "Our standard of review for rulings on the admissibility of evidence is essentially the same whether the challenge is made by a pre-trial motion to suppress or by an objection at trial." Id. We do not reweigh the evidence, and we consider conflicting evidence in the light most favorable to the trial court's ruling. Id. We also consider uncontroverted evidence favoring Freeman. See id.

Freeman argues that there was not reasonable suspicion to detain him and that there was not probable cause to arrest him for public intoxication.[1] We disagree. Police can briefly detain an individual for investigatory purposes without a warrant if, based on specific and articulable facts, the officer has reasonable suspicion that criminal activity "may be afoot." Scott v. State, 855 N.E.2d 1068, 1072 (Ind. Ct. App. 2006) (citing Terry v. Ohio, 392 U.S. 1, 30, 88 S. Ct. 1868, 1885 (1968). "Reasonable suspicion entails some minimal level of objective justification for making a stop, something more than an unparticularized suspicion or hunch, but less than the level of suspicion required for probable cause." Id. In evaluating the validity of a stop, we consider the totality of the circumstances. Id. at 1072-73. The determination of whether reasonable suspicion existed is reviewed de novo. Id. at 1073.

Here, Officer Tudor observed Freeman outside a bar in the early morning hours being loud. Officer Tudor continued observing Freeman and saw him fighting with

[1] Freeman claims that the search violated both his United States constitutional rights and his Indiana constitutional rights, but does not establish a separate argument regarding the Indiana Constitution. Therefore, we address only the alleged violation of his United States constitutional rights.

another man. This is reasonable suspicion that criminal activity may be afoot. The officers were justified in briefly detaining Freeman.

Regarding probable cause to arrest him for public intoxication, Freeman argues that there was no alcohol at the scene, that the officers did not question him regarding alcohol consumption or perform field sobriety tests, and that he was not charged with public intoxication. Accordingly, he claims there was no probable cause to arrest him for public intoxication.

An officer may make a warrantless arrest of a person when the officer has probable cause to believe the person has committed a misdemeanor in his or her presence. Winebrenner v. State, 790 N.E.2d 1037, 1040 (Ind. Ct. App. 2003). "Probable cause exists when, at the time of the arrest, the arresting officer has knowledge of facts and circumstances that would warrant a person of reasonable caution to believe that the suspect had committed a criminal act." Id. "The amount of evidence necessary to meet the probable cause requirement is determined on a case-by-case basis . . . and the facts and circumstances need not relate to the same crime with which the suspect is ultimately charged." Otitz v. State, 716 N.E.2d 345, 348 (Ind. 1999).

"It is a Class B misdemeanor for a person to be in a public place or a place of public resort in a state of intoxication caused by the person's use of alcohol or a controlled substance . . . ." Ind. Code § 7.1-5-1-3. Officer Tudor first observed Freeman outside of a bar around 3:00 a.m. He followed the Freeman and another man as they walked down the street and saw them start to fight. Officer Tudor testified that when he approached the men he observed that they were intoxicated. He smelled a strong odor of

alcohol and noticed that they were unsteady on their feet. They had slurred speech, abusive attitudes, and "red, glassy eyes." Tr. p. 125. This evidence was sufficient to establish probable cause to support an arrest for public intoxication.[2]

A search incident to a lawful arrest is one exception to the warrant requirement. Moffitt v. State, 817 N.E.2d 239, 246 (Ind. Ct. App. 2004), trans. denied. "Under this exception, an officer may conduct a warrantless search of the arrestee's person and the area within his or her immediate control." Id. Our initial inquiry under this exception is to determine whether the arrest itself was lawful. Id. Because Officer Glover was conducting a search incident to a lawful arrest when he discovered hydrocodone in Freeman's pocket, the trial court properly denied Freeman's motion to suppress and admitted the evidence of the hydrocodone at trial.

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[2] Freeman argues in part:

> While mere probable cause to believe someone may have violated the law may be enough to justify the brief detention of an individual, the Court should depart from past caselaw [sic] and hold that the State must first prove the elements of the alleged crime for which the individual was detained before trying one of a crime which would not have been discovered but for the initial stop. To continue to hold otherwise invites continued abuse of police power and fabrication of reasons to infringe on the Constitutional rights of Indiana's citizens. Without such a ruling, the all too familiar and often invented "broken taillight", "failure to use a turn signal," and other fabricated reasons for police unjustly initiating stops will continue, making us more of a police state all the time.

Appellant's Br. p. 10. Our supreme court has held that facts and circumstances providing probable cause for the arrest need not relate to the same crime with which the defendant is charged. See Oritz, 716 N.E.2d at 348. We are bound by the decisions of our supreme court, we reject Freeman's request to depart from this precedent. See Scott v. State, 871 N.E.2d 341, 344 n.4 (Ind. Ct. App. 2007), trans. denied.

II. Amended Charging Information

Freeman also argues that the trial court improperly entered a conviction for Class D felony possession of a schedule III controlled substance when he was charged with Class D felony possession of a schedule II controlled substance. Freeman was initially charged with Class D felony possession of a schedule III controlled substance, and the State subsequently amended the charge to Class D felony possession of a schedule II controlled substance. Freeman claims that he had no clear notice as to which charge he was required to defend against.

However, Freeman did not object to the jury instructions, the verdict form, or the entry of the conviction, all of which mentioned a schedule III controlled substance. The purpose of the contemporaneous objection requirement is to promote a fair trial by precluding a party from sitting idly by and appearing to assent only to cry foul when the outcome goes against him or her. Absher v. State, 866 N.E.2d 350, 354-55 (Ind. Ct. App. 2007). Therefore, the failure to object at trial constitutes waiver of review unless an error is so fundamental that it denied the accused a fair trial. Id. at 355.

To the extent Freeman's argument may be construed to include an allegation of fundamental error, it is unavailing. The doctrine of fundamental error is only available in egregious circumstances. Id. "The mere fact that error occurred and that it was prejudicial will not satisfy the fundamental error rule." Id. "Likewise, it is not enough, in order to invoke this doctrine, to urge that a constitutional right is implicated." Id. To qualify as fundamental error, an error must be so prejudicial that a fair trial is impossible and must constitute a blatant violation of basic principles, the harm or potential for harm

must be substantial, and the resulting error must deny the defendant fundamental due process. Id.

Here, we are not convinced that Freeman was prejudiced in anyway by the inconsistency. The unlawful possession of a schedule II controlled substance and possession of a schedule III controlled substance are both Class D felonies. As the forensic scientist testified, hydrocodone by itself is a scheduled II controlled substance and "depending on its dosage with any other ingredients," hydrocodone can fall into a schedule III or a schedule V. Tr. p. 221. At trial, Freeman presented no evidence that he possessed something other than a schedule II or a schedule III controlled substance as his defense. Because the scheduling of the drug did not affect the class of the offense and was not related to Freeman's defense, the inconsistency did not result in prejudice, let alone fundamental error.

III. Sentence

Freeman also argues that he was improperly sentenced. The trial court considered the proposed mitigating and aggravating circumstances and concluded, "The Court finds one mitigating circumstance in this case and that is your kids, Mr. Freeman. However, that one mitigating circumstance is substantially outweighed by the aggravating circumstance which would be your criminal history." Tr. p. 336. The trial court sentenced Freeman to three years on the Class D felony conviction, which was enhanced by an additional seven years for being an habitual substance offender.

Freeman asserts, "This departure from the presumptive sentence is not permissible since aggravating sentences were not found by a jury. Thus, this case must at least be

remanded for new sentencing in compliance with Blakely as interpreted in Indiana." Appellant's Br. p. 13. Freeman also claims that the trial court failed to properly consider and weigh various mitigating circumstances.

Because Freeman committed the offense in 2007, well after the 2005 amendments to the sentencing statutes became effective, we review his sentence under the post-Blakely standard of review set forth in Anglemyer v. State, 868 N.E.2d 482, 491 (Ind. 2007).

> To summarize, the imposition of sentence and the review of sentences on appeal should proceed as follows:
>
> 1. The trial court must enter a statement including reasonably detailed reasons or circumstances for imposing a particular sentence.
>
> 2. The reasons given, and the omission of reasons arguably supported by the record, are reviewable on appeal for abuse of discretion.
>
> 3. The relative weight or value assignable to reasons properly found or those which should have been found is not subject to review for abuse.
>
> 4. Appellate review of the merits of a sentence may be sought on the grounds outlined in Appellate Rule 7(B).

Anglemyer, 868 N.E.2d at 491.

Regarding the alleged judicial finding of aggravators, our supreme court has stated, "By eliminating fixed terms, the Legislature created a regime in which there is no longer a maximum sentence a judge 'may impose without any additional findings.'" Id. at 489 (quoting Blakely v. Washington, 542 U.S. 296, 304, 124 S. Ct. 2531, 2537 (2004) (emphasis omitted)) (alteration in original). "And this is so because for Blakely purposes

the maximum sentence is now the upper statutory limit. As a result, even with judicial findings of aggravating circumstances, it is now impossible to 'increase [ ] the penalty for a crime beyond the prescribed statutory maximum.'" Id. (quoting Blakely, 542 U.S. at 301, 124 S. Ct. at 2537)). Moreover, the use of criminal history as an aggravator is exempt from Blakely's jury fact-finding requirement. Davis v. State, 835 N.E.2d 1087, 1088 (Ind. Ct. App. 2005). Thus, Freeman's claim that his criminal history was an invalid aggravator because it was not found by a jury is without merit. The trial court properly considered his criminal history as an aggravating circumstance.

As for the mitigators, Freeman asserts the trial court should have considered the fact that the crime neither caused nor threatened serious harm to persons or property. Freeman did argue this before the trial court, and the State responded that the evidence showed that Freeman "was drunk and fighting in the streets." Tr. p. 333. It was within the trial court's discretion not to find this as a mitigating factor. Regarding the weight assigned to the hardship to Freeman's children, we cannot reassess the weight assigned by a trial court to a mitigator. See Anglemyer, 868 N.E.2d at 491.

Freeman has not shown that the trial court erred in assessing the aggravating and mitigating factors. In the absence of such a showing, we conclude the trial court did not abuse its discretion in sentencing him.[3]

[3] Freeman makes no argument regarding the appropriateness of his sentence under Indiana Appellate Rule 7(B).

Conclusion

The trial court properly admitted evidence of the hydrocodone found in Freeman's pocket because it was discovered during a search incident to a lawful arrest. Freeman's failure to object waives review of the inconsistency between the charging information and the judgment of conviction, and Freeman did not establish fundamental error. The trial court did not abuse its discretion in sentencing Freeman. We affirm.

Affirmed.

CRONE, J., and BRADFORD, J., concur.